No. 87-1344

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

RICHARD L. THORNBURGH, Attorney General of the United States, *et al.*,

Petitioners,

vs.

JACK ABBOTT, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF THE CORRECTIONAL ASSOCIATION OF NEW YORK AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF AMICUS CURIAE CORRECTIONAL ASSOCIATION OF NEW YORK

The Correctional Association of New York, founded in 1844, is a private non-profit civic organization with unique

statutory authority to visit prisons and to report its findings and recommendations to the New York State Legislature.[1] The Association, a close observer of conditions in New York State's jails and prisons, has a continuing interest in assuring safe and humane conditions for inmates and correctional employees.

We have a special interest in the issue of prisoners' access to publications because one of our chief activities is preparing public reports on aspects of the correctional and criminal justice systems, many of which are highly critical of prison authorities.[2] The prison popula-

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[1] Act to Incorporate the Prison Association of New York, ch. 163, 1846 N.Y. Laws 175, amended by Act of June 5, 1973, ch. 398, 1973 N.Y. Laws 757.

[2] These include Doing Idle Time: An Investigation of Inmate Idleness in New York's Prisons and Recommendations for Change (1984); Attica 1982: An Analysis of Current Conditions in New York State's Prisons (1982); Women Prisoners at

tion is an important part of our public, and we have sent many copies of our reports to inmates upon request. A decision in this case that gives wide latitude to prison censors could cripple our ability to inform prison inmates of the fruits of our work.

STATEMENT OF THE CASE

Amicus relies on Respondents' Statement insofar as it describes the prior proceedings and the record in this case.[3]

(footnote cont'd)

Bayview: A Neglected Population (1985); State of the Prisons: Conditions Inside the Walls (1986); The Mentally Impaired in New York's Prisons: Problems and Solutions (1987); and AIDS in Prison: A Crisis in New York Corrections (1988).

[3] Specific references to the record in the body of the brief are denominated "J.A." (Joint Appendix), "J.L." (Joint Lodging), "T." (transcript of trial), "Dep." (depositions admitted to the trial record), "Adm." (admissions in the trial record), or by trial exhibit number.

We set out below the history of "media review" disputes in New York State prisons upon which our perspective is based.

Until 1971, New York prisons had no formal standards or procedures governing the censorship of publications. See Fortune Society v. McGinnis, 319 F.Supp. 901, 903 (S.D.N.Y. 1970). Under pressure of litigation, they established review committees to determine whether publications were obscene or "tend[ed] to excite activities posing a threat to prison discipline";[4] later, they established more detailed guidelines and procedures.[5]

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[4] Sostre v. Otis, 330 F.Supp. 941, 943 (S.D.N.Y. 1971).

[5] Jackson v. Ward, 458 F.Supp. 546, 550 (W.D.N.Y. 1978); Sostre v. Otis, 70 Civ. 1114, unreported order (S.D.N.Y., November 8, 1971), cited in Jackson, 458 F.Supp. at 551-52.

The media review guidelines were substantively narrowed in later litigation,[6] but inmates continued to complain of improper censorship, in many cases because prison officials utilized a new, vague guideline prohibiting "[a]ny publication which presents a clear and immediate risk to the safety of any person or a clear and immediate risk to the order of the correctional facility."[7] When several prisoners later moved to challenge the censorship of 51 more publications, prison authorities let them have the named publications but did not reform their practices.[8] A new

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[6] Jackson v. Ward, 458 F.Supp. at 559-63.

[7] New York State Department of Correctional Services Directive 4572 (superseded), March 2, 1979, at 2, guideline 9. A copy of this directive is lodged with the Clerk of Court. Lodging of amicus curiae at pp. 1-6 [hereinafter "Am. Lodg., pp. ___"].

[8] Jackson v. Ward, Civ.-1969-435, Motion for Leave to Intervene and for Further Relief (W.D.N.Y., February 27, 1981).

lawsuit was then filed citing the improper censorship of nearly 100 other publications. Dumont v. Coughlin, 82-CV-1059 (N.D.N.Y., filed October 4, 1982). This litigation was resolved by a consent judgment[9] and a revised administrative directive, again narrowing the media review guidelines and imposing more rigorous censorship procedures.[10] After these reforms, the amount of censorship, as well as inmate complaints, slowed to a trickle

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9 The consent judgment lists 93 publications that defendants agreed plaintiffs were entitled to receive. Dumont v. Coughlin, 82 CV 1059, Stipulation for Entry of Partial Final Judgment, Attachment A (N.D.N.Y., October 12, 1983). A copy of this judgment is lodged with the Clerk of Court. Am. Lodg., pp. 7-34.

10 New York State Department of Correctional Services Directive 4572, April 24, 1986 [hereinafter "New York Directive"]. A copy of this Directive is Appendix B to this brief [hereinafter "App. B-__"].

and has remained at a low level.[11]

SUMMARY OF ARGUMENT

Prison censorship is inherently subject to abuse. The persistent tendency of those in authority to suppress criticism and unwelcome viewpoints is heightened in prisons because of their authoritarian character, their isolation from outside scrutiny, and the powerlessness of their inmates. The history of "media review" in New York State prisons, like the present record, shows that prison censorship, even

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11 For example, the number of publications censored at Auburn Correctional Facility dropped from about 36 a month in 1981-82 to about seven a month in 1987-88. Dumont v. Coughlin, affidavit in support of motion for preliminary injunction, October 14, 1982, at ¶ 25, and exhibits cited; Response from Auburn Correctional Facility to Freedom of Information Law request, February 25, 1988. (Both documents are on file at the offices of the Prisoners' Rights Project of The Legal Aid Society of the City of New York.)

when nominally justified by legitimate security concerns, persistently exceeds its justification, and that specious security rationales are advanced to prevent inmates from reading materials that merely criticize prison or law enforcement officials or advance unpopular political viewpoints. The distinction between prison management and thought control is simply not well appreciated by prison censors.

For this reason, prison censorship, like other restrictions on core First Amendment interests, must be narrowly tailored to serve important governmental interests and to go no further than necessary in restricting press freedom and prisoners' right to read. Broad notions of "deference" to the supposed expertise of prison officials are misplaced in this area because of the clear likelihood that

administrative discretion will be abused. Moreover, as a rule, the reading of books, magazines and newspapers poses no substantial threat to prison security and order. Exceptions, such as instructions in making explosives, picking locks, and hand-to-hand fighting, or direct exhortations to unlawful and violent conduct, may be covered by narrowly drawn regulations.

New York's prisons have been operating under such a narrowly drawn administrative scheme for several years after a series of lawsuits raising various substantive and procedural challenges. As a result, questionable censorship and resulting inmate complaints have been drastically reduced. Prison officials have made no claim in litigation or in any other forum that inmates' reading publications pursuant to these regulations has caused any threat to security, order

or rehabilitation.

Several features of the New York regulations are noteworthy and, in our view, are necessary to the protection of prisoners' First Amendment right to read.

> **- Narrow, specific and exclusive descriptions of the types of material that can be censored.** Vague "catchall" censorship rules invite overbroad application and reliance on personal prejudices.
>
> **- Specific statements of reasons precisely identifying both the objectionable material and the reason it violates the rules.** When prison censors are required to spell out their reasoning, it is more likely that they will scrupulously follow their own rules.
>
> **- Item censorship.** If only a small portion of a publication is objectionable, the prisoner should have the option of receiving the remainder.
>
> **- De novo administrative review.** Because the risk of erroneous censorship is so great in prison, a detached review of the substantive propriety of censorship decisions is essential.

ARGUMENT

I. WITHOUT RIGOROUS SCRUTINY, PRISON CENSORSHIP INEVITABLY EXPANDS BEYOND ITS LEGITIMATE BOUNDS.

"All government displays an enduring tendency to silence, or to facilitate silencing, those voices that it disapproves." Arkansas Writers' Project, Inc. v. Ragland, ___ U.S. ___, 95 L.Ed.2d 209, 223, 107 S.Ct. 1722, 1730 (1987) (Scalia, J., dissenting).[12] This tendency is particularly pronounced in prisons because of their authoritarian task, their insularity, and their isolation from public scrutiny and the mainstream of

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12 Accord, Younger v. Harris, 401 U.S. 37, 65 (1971) (Douglas, J., dissenting), quoted in City of Houston v. Hill, ___ U.S. ___, 107 S.Ct. 2502, 2512 n. 15, 96 L.Ed.2d 398, 414 n. 15 (1987) (recognizing "[t]he eternal temptation . . . to arrest the speaker rather than to correct the conditions about which he complains"). See also City of Lakewood v. Plain Dealer Publishing Co., ___ U.S. ___, 100 L.Ed.2d 771, 782-83, 108 S.Ct. 2138, 2144 (1988).

civilian life. See West v. Atkins, ___ U.S. ___, ___ L.Ed.2d ___, 108 S.Ct. 2250, 2260 n. 15 (1988); Cleavinger v. Saxner, 474 U.S. 193, 204-05 (1985); Ingraham v. Wright, 430 U.S. 651, 670 (1977).

In prisons, therefore, the danger is especially great that censors will attempt "to eliminate unflattering or unwelcome opinions" and "to apply their own personal prejudices and opinions. . . ." Procunier v. Martinez, 416 U.S. 396, 413, 415 (1974). Indeed, the Procunier Court explicitly acknowledged this danger, observing: "Not surprisingly, some prison officials used the extraordinary latitude for discretion authorized by the regulations to suppress unwelcome criticism." Id. at 415.[13] In that case, prison

[13] The Court acknowledged a similar danger in Cleavinger v. Saxner, noting that prison discipline committee members are "under obvious pressure to resolve a disciplinary dispute in favor of the institu-

censors vainly attempted to justify excluding letters "criticizing policy, rules or officials," "belittling staff or our judicial system or anything connected with the Department of Corrections," or containing "disrespectful comments" or "derogatory remarks." Id.

Experience with prison censorship shows that its abuse is pervasive and recurrent.[14] Time and again, one finds

(footnote cont'd)

tion and their fellow employee." 474 U.S. at 204.

[14] Occasionally it becomes absurd. Counsel for amicus once received a complaint that a New York prison had deemed all maps to present risks of escape, and pursuant to this edict maps of the Moon and other planets were removed from the prison library. In a Wisconsin prison, pursuant to a ban on material about making weapons, inmates were forbidden to receive an issue of The Progressive containing an article about the hydrogen bomb. New York Times, August 13, 1979; see United States v. Progressive, Inc., 467 F.Supp. 990 (W.D.Wis.), appeal dismissed, 610 F.2d 819 (7th Cir. 1979).

that the banned publications do not advocate criminal behavior or prison disruption, are not obscene, and do not instruct in bomb-building, liquor-brewing, lock-picking, escape-planning or other dangerous activities. Rather, they express the views of racial, religious, political and sexual minorities or contain information and opinion that reflects badly on authority figures or prison officials.

The caselaw is replete with examples of this kind of overbroad censorship,[15] as

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[15] Guajardo v. Estelle, 580 F.2d 748, 760 (5th Cir. 1978) (Penal Digest International, published by the Fortune Society); Aikens v. Jenkins, 534 F.2d 751, 754 (7th Cir. 1976) (Dostoevski's The Gambler, Gibran's The Prophet, and all publications of Bantam Books); Jackson v. Godwin, 400 F.2d 529, 530-31 (5th Cir. 1968) (Ebony, Sepia, Pittsburgh Courier, and Amsterdam News banned; magazines restricted to U.S.News and World Report, Sports Illustrated, Reader's Digest, National Geographic, Outdoor Life, Saturday Evening Post, and Pocket Crossword Puzzles); Lawson v. Wainwright, 641 F.Supp. 312,

is the history of "media review" in New York. For example, in the Dumont case, supra at 6, plaintiffs challenged the censorship[16] of:

> Illusions of Justice: Human Rights Violations in the United States by Lennox S. Hinds, the book version of a petition submitted to the United Nations Commission on Human Rights by civil rights and church groups.

(footnote cont'd)

316-17 (S.D.Fla. 1986), aff'd sub nom. Lawson v. Dugger, 840 F.2d 781 (11th Cir. 1987), rehearing denied, 840 F.2d 779 (11th Cir. 1988) (religious publications including a dietary manual and historical accounts of lynchings of blacks); McMurry v. Phelps, 533 F.Supp. 742, 765 (W.D.La. 1982) (Life magazine); Aikens v. Lash, 390 F.Supp. 663, 671 (N.D.Ind. 1975), aff'd sub nom. Aikens v. Jenkins, supra (Quotations of Chairman Mao Tse-Tung) ; Laaman v. Hancock, 351 F.Supp. 1265, 1269 (D.N.H. 1972) (writings of Karl Marx and successors); Fortune Society v. McGinnis, 319 F.Supp. at 903.

[16] These publications and the prison documentation are lodged with the Clerk of Court. Am. Lodg., pp. 35-68 and separate lodging.

The book, published by the School of Social Work of the University of Iowa, contains an historical account of the Attica uprising, then 11 years past, drawn from the official report on the incident, writings by the Attica superintendent, the special prosecutor in the case, and journalist Tom Wicker, news reports, and the opinion in Inmates of Attica v. Rockefeller, 453 F.2d 12 (2d Cir. 1971). The prison censor claimed the account "represent[ed] authority figures acting in a manner which would encourage anarchy and disrespect for authority figures." Am. Lodg., p. 35 and separate lodging.

Cointelpro: The FBI's Secret War on Political Freedom, by Nelson Blackstock, with an introduction by Noam Chomsky, which describes the FBI's well-known program of covert surveillance and disruption of political groups and includes after each chapter a selection of government documents obtained under the Freedom of Information Act. The prison censor claimed that two chapters were "racist in nature"; in fact, they merely described covert activities directed at black leaders. Am. Lodg., p. 36 and separate lodging.

Fortune News, August-September 1981, a newsletter that "con-

tains articles and information on prison reform, ex-convicts' rehabilitation and the activities of the [Fortune Society]," [17] was censored because of "Security" and its "biased opinion of Attica." [18] The magazine contains articles on the Attica uprising and commentary on prison problems in other states, a review of In the Belly of the Beast by Jack Abbott, and a talk before a seminar for judges and legislators. There is no advocacy of violent or disruptive conduct. Am. Lodg., pp. 37-49, 50.

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17 Fortune Society v. McGinnis, 319 F.Supp. at 902.

18 A decade earlier the same magazine was censored because it did not "reflect[] the truth concerning conditions in the state prison facilities." Fortune Society v. McGinnis, 319 F.Supp. at 903. Similar rationales have been used by Petitioners in this case. For example, a publication called Cruzan Satellite was censored because officials believed that it was "totally inaccurate." Witkowski Dep. 120-21, 130. The exclusion of a newspaper, Labyrinth, containing an article critical of medical care at the Marion prison that officials believed was "slanted," J.A. 107, was approved by then Director Carlson because it raised issues "which may or may not be true." Carlson Dep. at 75.

> Gay Community News, vol. 9, no. 26 (January 23, 1982), was censored based on an article titled "The Philadelphia Police--Brutal to Some," with the censor citing "Guideline # 2 (Homosexuality); Guideline 9 (Security); Guideline 6 (Security)." In fact, the cited article is a "news analysis" that discusses relations between the Philadelphia police and that city's gay community, emphasizing improvements since the departure of Mayor Frank Rizzo. It contains no obscenity and no advocacy of illegal or disruptive conduct. Am. Lodg., pp. 52-57, 68.

Additional examples of absurd and unjustified acts of censorship are given in Appendix A.

More recently, the New York Commissioner of Correctional Services banned Attica: A Report on Conditions, 1983 (a report prepared for public distribution by Prisoners' Legal Services of New York, a state-funded agency), bypassing the established media review procedures and standards entirely and relying instead on

his "personal and professional judgment. . . ." Abdul Wali v. Coughlin, 754 F.2d 1015, 1024 (2d Cir. 1985).[19] The report discussed a recent prisoner strike and commented critically on prison conditions and staff, but it did not advocate or incite violent behavior or disobedience of prison rules.

The overbreadth of much prison censorship is confirmed by the apparent lack of damage to legitimate prison interests when formerly censored publications are given to their recipients. In Abdul Wali, for example, the court not only enjoined the censorship of the report but also attached it as an appendix to its opinion, making it available in every

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19 This act of censorship was of great concern to amicus, since we had published a rather similar report on conditions at Attica the previous year.

prison law library in New York State. No disruptions or other adverse consequences have been reported. Similarly, in Dumont, supra at 6, prison officials agreed to let prisoners read the four publications described above and 89 others of similar character, and no claim was ever made that any disruption or any other damage to legitimate prison interests resulted.

Other publications have been treated similarly.[20] In the main proceedings in Jackson v. Ward, by the time the record was closed, defendants had conceded that there was no justification for many of their prior acts of censorship. 458 F.Supp. at 555. In short, prison censors commonly cite legitimate prison interests, but their claims collapse in the face of legal challenge or subsequent experience.[21]

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20 Prison officials abandoned their censorship of 51 publications in Jackson v. Ward, supra n. 8, with no claimed ill effect. Although Elijah Muhammad's book The Fall of America was censored, prison officials agreed when sued to let the plaintiffs read it and to change the regulation under which it had been censored. Haines v. Ward, 73 Civ. 4361, Stipulation and Order (S.D.N.Y., March 31, 1976). Prison officials also objected to two pages of Comrade George, a biography of prisoner/author George Jackson, but they inadvertently sent motion papers containing the dangerous two pages to the inmate plaintiff, with no adverse consequences. The district court granted the plaintiff summary judgment. United States ex rel. Haymes v. Preiser, 73-CV-411,

(footnote cont'd)

Memorandum-Decision and Order (N.D.N.Y., July 19, 1974).

21 The present record contains numerous similar examples. An issue of The Call (Plaintiffs' Exhibit 15, J.L. 6-12) was rejected at Marion because "it has a tendency to glorify problem inmates, homosexuals and prison unions which have caused problems to inmates and staff. . . ," Adm. 575, 582, J.A. 114-15, but the chairman of the prison's censorship committee admitted that the publication would not be detrimental to security. J.A. 109-11.

An issue of The Militant (Plaintiffs' Exhibit 93, J.L. 50-51) was rejected in part because it "glorified problem inmates," J.L. 46-48, but Respondents consented to its admission in other litigation, and the official who had affirmed the rejection admitted that it contained

II. PRISON CENSORSHIP MUST BE SUBJECT TO EXACTING SUBSTANTIVE AND PROCEDURAL SAFEGUARDS

State-imposed restrictions on the freedom of speech are subjected to "exacting scrutiny." First National Bank of Boston v. Bellotti, 435 U.S. 765, 786 (1978). Prison mail censorship "must further an important or substantial governmental interest unrelated to the suppression of expression" and "the limitation of First Amendment freedoms must be no greater than is necessary or essential to the protection of the particular governmental interest involved." Procunier v. Martinez, 416 U.S. at 413. Even in prison, the burden of justifying censorship is on the censor. Id.[22] Rights of free speech must also be protected by "rigorous procedural safeguards," Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 66 (1963), "to insure that the government treads with sensitivity in areas freighted with First Amendment concerns." Chicago Teachers Union v. Hudson, 475 U.S. 292,

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(footnote cont'd)

no articles detrimental to security. J.L. 43-44. Respondents also conceded that another rejected issue of The Militant, for July 8, 1977, also admitted by consent in separate litigation, contained no articles detrimental to prison security, good order or discipline. Adm. 802; Plaintiffs' Exhibit 90; Cripe Dep. II at 116-18.

An issue of The Guardian (Plaintiffs' Exhibit 47, J.L. 37-38) was censored because it allegedly "contained articles that promote the formation of prisoner unions and an adversary attitude among inmates towards staff" (Adm. 695, 696, J.A. 118), but the official who had affirmed the censorship admitted that these reasons were not supported in the publication. J.A. 71-72.

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22 In Procunier itself, the Court noted the prison officials' failure to show how inmates' complaining letters actually threatened correctional interests. Id. at 416.

303 n. 12 (1986).[23] Prison censors, though not required to seek judicial review of censorship decisions, must provide notice, a reasonable opportunity to protest, an appeal to an official uninvolved in the original decision, and meaningful statements of reasons. Procunier v. Martinez, 416 U.S. at 417-19;[24] Murphy v. Missouri Dept. of Corrections, 814 F.2d 1252, 1258 (8th Cir. 1987); Hopkins v. Collins, 548 F.2d 503,

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23 In this area as elsewhere, "[t]he history of liberty has largely been the history of observance of procedural safeguards." McNabb v. United States, 318 U.S. 332, 347 (1943). "Without procedural safeguards, regulatory schemes will tend to inhibit the activity involved." United States v. Robel, 389 U.S. 258, 278 (1967) (Brennan, J., concurring).

24 Although the Procunier Court did not discuss reasons, it did require a "meaningful opportunity to protest [the] decision," id. at 418, and the plan approved by the district court below required reasons. Id. at n. 15.

504 (4th Cir. 1977); Jackson v. Ward, 458 F.Supp. at 565; Cofone v. Manson, 409 F.Supp. 1033, 1041 (D.Conn. 1976).[25]

The requirements of narrow tailoring and of procedural safeguards are largely directed at curbing the discretion of administrators and law enforcement officials. "This Court has recognized that the lodging of such broad discretion in a public official allows him to determine which expressions of view will be permitted and which will not. This thus sanctions a device for the suppression of the communication of ideas and permits the

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25 These procedural protections will be needed regardless of the substantive standard the Court adopts. Such safeguards will help to ensure that prison censors actually apply the appropriate test. Indeed, if the Court were to adopt the loose "reasonable relationship" test sought by Petitioners, Pet. Br. at 12ff., the need for procedural protections to guarantee accurate administrative determinations would be greater.

official to act as a censor." Cox v. Louisiana, 379 U.S. 536, 557 (1965).[26] "Because the censor's business is to censor, there inheres the danger that he may well be less responsive than a court--part of an independent branch of government--to the constitutionally protected interests in free expression." Freedman v. Maryland, 380 U.S. at 57-58.

Consequently, in a "pure speech" case like this one, involving the rights of free citizens as well as prisoners, the Court's broad holdings regarding deference to prison administrators' discretion have little application and, indeed, are fundamentally at odds with the nature of the right at issue.[27] See Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 843 (1978) ("Deference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake.")

That is so not only because of the

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26 See also City of Houston v. Hill, ___ U.S. at ___, 96 L.Ed.2d at 414-15, 107 S.Ct. at 2512; Board of Airport Commissioners v. Jews for Jesus, Inc., ___ U.S. ___, 96 L.Ed.2d 500, 508-09, 107 S.Ct. 2568, 2572-3 (1987); Secretary of State of Md. v. J.H. Munson Co., 467 U.S. 947, 964 n. 12 (1984); Freedman v. Maryland, 380 U.S. 51, 57-58 (1965).

27 The Court has acknowledged as much in two of its leading "deference" cases.

In Jones v. North Carolina Prisoners' Union, 433 U.S. 119, 130 (1977), while restricting the associational activities of a prison labor union, the Court was careful to note that "First Amendment speech rights are barely implicated in this case. . . ." The prisoners had challenged the ban on "bulk mailings" of union literature--i.e., large bundles of newsletters to be distributed by inmates within the prison. Jones, 433 U.S. at 130 n. 7. The prison officials did not attempt to interfere with publications mailed individually to particular inmates. Id. at 131 n. 8.

Similarly, in upholding a content-neutral rule requiring that hardcover books be received only from publishers, book clubs or bookstores, the Court emphasized that "free speech values" were not implicated. Bell v. Wolfish, 441 U.S. 520, 552 (1979), quoting Jones, 433 U.S. at 130-31 (emphasis in original).

acknowledged dangers of overbroad censorship but also because reading by prisoners simply poses no substantial threat to prison officials' legitimate interests. Of course there are exceptions. No one disputes that instructions for making explosives, drugs or alcohol, picking locks, or prevailing in hand-to-hand combat may be denied to prisoners. But such publications are not the central issue here. Rather, most of the disputed publications consist of discussions of social and political issues--i.e., expression that is at the core of First Amendment protections. See First National Bank of Boston v. Bellotti, 435 U.S. at 786; Young v. American Mini Theatres, 427 U.S. 50, 61 (1976). There is no basis for concluding that these publications pose any real threat to security, order or rehabilitation.

This view is confirmed by the complete lack of evidence of actual damage to correctional interests caused by reading publications in the record of this case,[28] or of any other reported or unreported case known to amicus.[29] The significance

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[28] Indeed, defendants' fact witnesses, when questioned on the subject, admitted that they could cite no examples of the adverse consequences of prisoners' reading books and magazines. Witkowski Dep. at 122, 161; Todd Dep. at 45; Cripe Dep. at II, 34; McCune, T. at 1062; Williams Dep. at 69, 140. Defendants' and plaintiffs' experts both gave testimony to the same effect. Young, T. at 1251.16; Conrad, T. at 356-57, 547 (J.A. 26); McManus, T. at 148; Sielaff, T. at 436-37, 440; Kamka, T. at 607-08; Wolfgang, T. at 21, 27-28.

[29] The State of Missouri, in its brief amicus curiae at 2, asserts that "postings and hand-outs of white supremacist literature" exacerbate racial tension and fear in prisons but states that its restrictions on this literature did not survive review in Murphy v. Missouri Department of Corrections, 814 F.2d 1252 (8th Cir. 1987).

Insofar as the Missouri officials are concerned with "postings and hand-outs," they have nearly unreviewable discretion to restrict these activities under Jones v. North Carolina Prisoners' Union, 433

of this evidentiary void is great. Equally compelling are the instances in which publications were excluded from one prison but permitted--indeed, in one case, sold in the commissary--in other prisons of the same security level, apparently without adverse consequences.[30]

(footnote cont'd)

U.S. at 130, without interfering with individuals' right to read.

Moreover, prison officials' right to ban materials that incite violent action or otherwise present a concrete threat was undisturbed by the district court, 814 F.2d at 1256, and would remain so under the test we urge. Missouri's blanket ban on certain organizations' literature, regardless of its actual content, was correctly struck down. Instead, prison officials must read and review each piece of literature individually, give the intended recipient notice of censorship, and provide review of consorship decisions by another prison official. Id. at 1258.

30 See, e.g., Adm. 6019-21; Williams Dep. at 101, Wilkinson Dep. at 17-18 (Hustler magazine excluded from Lewisburg, Atlanta and Springfield but sold in the commissaries of Marion, Terre Haute and Leavenworth); Adm. 575, 576, 577, 582 (J.A. 114-15), Witkowski Dep. at 100-02 (The Call excluded from Marion, Alderson and Terminal Island but received without

The experience of New York shows that restricting censorship by narrow and specific guidelines and rigorous administrative procedures can protect the First Amendment rights of publishers and prisoners without threatening the legitimate interests of correctional officials. Several important features of the New York regulatory scheme deserve the Court's attention and should be viewed as part of the minimal constitutional protection of prisoners' right to read.

(footnote cont'd)

incident by subscribers in Atlanta); Adm. 840, 842, 846-59, Plaintiffs' Exhibit 74, T. 1054 (The Outlaw routinely excluded from federal prisons; admitted to Atlanta pursuant to court order without adverse consequences); Adm. 6021 (J.A. 130), 6034 (all electronics and radio publications barred at Atlanta; such publications purchased for prisoners by prison officials at Lewisburg).

A. Prison censorship should be guided by narrow, specific and exclusive descriptions of the types of material that can be censored.

Petitioners' regulations allow the rejection of publications found "detrimental to the security, good order, or discipline of the institution or if it might facilitate criminal activity." 28 C.F.R. § 540.71(b) (1987). The court of appeals held that this criterion permitted censorship based on too loose a "causal nexus" between expression and proscribed conduct. J.A. 15a. Amicus agrees with this conclusion but urges that there is a more compelling ground for invalidation: the regulation fails to describe with specificity the kinds of material that can be banned.[31] The result is a classically

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[31] Although the regulation does state additional, more specific criteria, these are non-exhaustive and do not serve to limit the broad and undefined scope of the more general, "catchall" prohibition.

vague regulation.

The Court has long recognized that the constitutional prohibition of vague laws "applies with particular force in review of laws dealing with speech." Hynes v. Mayor of Oradell, 425 U.S. 610, 620 (1976); accord, Ashton v. Kentucky, 384 U.S. 195, 200 (1966). "The vice of vagueness is particularly pronounced where expression is sought to be subjected to licensing." Interstate Circuit v. Dallas, 390 U.S. 676, 683 (1968).

> Vague standards . . . encourage erratic administration whether the censor be administrative or judicial; "individual impressions become the yardstick of action, and result in regulation in accordance with the beliefs of the individual censor rather than regulation by law . . . ."
>
> Id. at 685, quoting Kingsley International Pictures Corp. v.

(footnote cont'd)

J.A. 15a.

Regents, 360 U.S. 684, 701 (1959) (Clark, J., concurring).[32]

Moreover, without "express standards,"

> post hoc rationalizations by the licensing official and the use of shifting or illegitimate criteria are far too easy, making it difficult for courts to determine in any particular case whether the licensor is permitting favorable, and suppressing unfavorable, expression.
>
> City of Lakewood v. Plain Dealer Publishing Co., ___ U.S. ___, 100 L.Ed.2d at 783, 108 S.Ct. at 2144.

"[E]xpress standards" are also essential as a practical matter to guide prison censors acting in good faith, since few are likely to be schooled in the nuances of the First Amendment and since the establishment of a censorship agency inevitably "breed[s] an 'expertise' tending to favor censorship over speech." ___ U.S. ___, 100 L.Ed.2d at 785, 108 S.Ct. at 2145.

Petitioners therefore should be required to promulgate express and exclusive standards describing the types of material that may be censored by prison personnel. The experience in New York demonstrates that such a requirement is both practical and necessary to keep censorship within constitutional bounds.

New York did not have a "catchall" censorship provision during most of the 1970's. After the narrowing of media review guidelines following Jackson v. Ward, 458 F.Supp. at 559-63, prison officials added a new guideline prohibiting "[a]ny publication which presents a clear and immediate risk to the safety of any person or a clear and immediate risk to the order of the correctional facility,"

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32 Accord, Grayned v. City of Rockford, 408 U.S. 104, 108 (1972).

without explanation or specification.[33] Prison censors then cited this guideline in continuing to censor protected political and social expression, defeating the purpose of narrowing the guidelines.[34]

This vague guideline was eliminated in the settlement of the Dumont litigation[35] without damaging prison officials' legitimate interests. As new problems appear, prison officials can address them with new and narrowly drawn regulations, as has already happened in New York.[36] Petitioners herein can also promulgate specific and exclusive standards and supplement them as needed with additional specific standards, implementing them immediately if necessary. See 5 U.S.C. § 553(b) (1977) (notice of

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33 See n. 7, supra.

34 For example, The Iron Fist and the Velvet Glove: An Analysis of the U.S. Police, by the Center for Research on Criminal Justice, was censored on this basis, even though it consisted solely of political analysis with no advocacy of violent or unlawful action. The issue of Fortune News described supra at 16 was also censored under this guideline. Both publications and the relevant documentation are lodged with the Clerk of Court. Am. Lodg., p. 69 and separate lodging.

Further examples of the tendency to utilize this vague guideline to censor protected news and commentary on social and political subjects are found in Appendix A, items 2, 3, 7 and 9.

35 The only "residual" category in the New York directive permits censorship of publications not falling into one of the prohibited categories if they are shown actually to result in violence or dis-

(footnote cont'd)

obedience. New York Directive, supra n. 10, App. B-6.

36 Between the settlement in Dumont and the final promulgation of a new statewide media review directive, prison officials added prohibitions of child pornography and materials that promote the sexual performance of a child (as spelled out in a state statute), and of materials that "[d]epict or describe techniques or methods for rioting and/or information instructive in hostage or riot negotiation techniques." New York Directive, supra n. 10, Guidelines B and H, App. B-3, 5-6.

rule-making and hearing not required where "impracticable, unnecessary, or contrary to the public interest").

B. Prison officials should be required to give statements of reasons for censorship specifically identifying the content of the offending material, its location in the publication, and the specific censorship rule that it violates.

A statement of reasons for adverse governmental action is a fundamental requirement of due process. Goldberg v. Kelly, 397 U.S. 254, 271 (1970). Lower courts have required reasonably specific statements of reasons for censorship decisions. Jackson v. Ward, 458 F.Supp. at 565; Cofone v. Manson, 409 F.Supp. at 1041, n. 21. "A reasons requirement promotes thought by the decision-maker, focuses attention on the relevant points and further protects against arbitrary and capricious decisions grounded upon

impermissible or erroneous considerations." Jackson, 458 F.Supp. at 565.[37] Reasonable specificity is required both to "ensure constitutional decision-making . . . [and to] provide a solid foundation for eventual judicial review." City of Lakewood, ___ U.S. at ___, 100 L.Ed.2d at 792, 108 S.Ct. at 2141.

"[D]ue process is flexible and calls for such procedural protections as the particular situation demands." Morrissey v. Brewer, 408 U.S. 471, 481 (1972). The content of a statement of reasons for censorship should be determined by the nature of the censorship inquiry. The question presented will usually be whether the content of a publication contravenes a narrowly drawn and specific regulation.[38]

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[37] This formulation is paraphrased in part from Dunlop v. Bachowski, 421 U.S. 560, 572 (1975).

[38] The district court missed the point in

In our experience, prison censors frequently fail to read the publication at issue closely and to compare its contents with the governing rule; instead, they censor based on generalized impressions colored by their personal hostility to the views expressed. The present record reveals that this type of error is characteristic of Petitioners' publication review process as well.[39] To minimize

(footnote cont'd)

holding that the statements of reasons need not contain "reference to the circumstances in the prison that support the Warden's decision" because it is "unwise to inform inmates of conditions that cause security concerns in the Warden." J.A. 33a. Petitioners did not cite a single instance in which "circumstances in the prison" were the basis for banning a publication.

39 For example, an issue of Win Magazine (P-Exh. 101, J.L. 59-88) was censored because one article "depicts, describes or encourages activities which may lead to [the] use of physical violence or group disruption," P-Exh. 99, A-207, J.L. 52, but defendants' witness admitted that the article merely criticized the federal prison industries program. J.A. 62.

such errors, statements of reasons for censorship should be required to identify with specificity the content of the offending material, its location in the publication, and the specific censorship rule that it violates.[40]

(footnote cont'd)

An issue of the socialist newspaper Workers' World (P-Exh. 105, A-244-46, J.L. 89-91) was rejected because it "supports the gay rights of inmates and rebellion and boycotting by inmates as a legitimate means of achieving goals." Adm. 934. The General Counsel who had affirmed this rejection admitted that there was nothing in it to support the censor's characterization. Cripe Dep. (II) 95-96.

An issue of The Call was rejected at Atlanta because it allegedly stated, inter alia, that "prisoners should revolt against the use of control units." In reality, as the court of appeals observed, the article in question "is highly critical of described practices, but is narrative in form" and "contains no exhortation." J.A. 18a.

The examples cited supra at n. 21, in which prison officials later admitted that the basis for censorship was false, are of a similar nature.

40 District courts have appropriately required prison censors to give "a brief statement of the reasons, in meaningful language, for rejection of the pub-

The wisdom of such a requirement--and its manageability--is demonstrated by the experience in New York. For years, many censorship decisions were explained only by the citation of a guideline number, a cryptic notation like "Security," or reference to a page or an article without elaboration.[41] Often, it was unclear whether the censor had actually applied the censorship rules to the publication's

(footnote cont'd)

lication, specifying the offending portion if less than the entire publication is objectionable." Jackson v. Ward, 458 F.Supp. at 565. "It is not enough that the rejection notice recite the applicable criterion." Cofone v. Manson, 409 F.Supp. 1041 n. 21.

41 See, e.g., documentation of censorship decisions for The Iron Fist and the Velvet Glove, Fortune News, and Gay Community News (lodged with the Clerk of Court). Am. Lodg., pp. 37-49, 50, 52-67, 68, 69 and separate lodging.

content or, indeed, had read the publication at all. In the present media review directive, however, censors are required to

> include a brief statement of reasons explaining why the publication is deemed to violate one or more of the media review guidelines and identifying by page number, article title, and location on the page, the contents objected to. (The [committee] shall not state that a publication is unacceptable in its entirety.)[42]

The directive gives examples of acceptable and unacceptable statements of reasons.

Experience shows that prison censors are quite capable, if required, of explaining themselves with specificity,[43] and the decreased volume of censorship[44]

42 New York Directive, supra n. 10, at 4, App. B-11.

43 Amicus has lodged with the Clerk of Court several recent examples of appropriately specific statements of reasons. Am. Lodg., pp. 70-74.

44 See n. 11, supra.

suggests that greater specificity has helped reduce the amount of unnecessary censorship in New York prisons.

C. If only part of a publication violates valid censorship rules, the prisoner should be permitted to read the remainder.

Censoring an entire publication because a small portion is objectionable violates the principle that "the limitation of First Amendment freedoms must be no greater than is necessary or essential to the protection of the particular governmental interest involved." Procunier v. Martinez, 416 U.S. at 413. Given the many publications that are banned only because of a single article or portion of an article,[45] such a provision

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[45] Lorenzo Ervin was denied an entire publication because of a one-page petition, although he would have preferred to receive the remainder of the publication with the petition removed. T. 754-55. An issue of Southern Struggle was rejected because of a single article. Adm. 902;

is an essential protection of inmates' First Amendment rights. The Director of

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(footnote cont'd)

Plaintiffs' Exhibit 26. Three issues of The Torch and two issues of Workers' World were each rejected because of a single article. Adm. 912, 914, 916, 945, 946 (J.A. 125-27); Plaintiffs' Exhibits 37, 57. An issue of Win Magazine was rejected because of one five-page section. Plaintiffs' exhibits 99, 101; Henderson, T. 1150Q.

An example from the New York prisons is F/X New Journal #2 (November 12, 1987), a magazine about special effects technology used in film-making. The New York authorities understandably objected to five pages about the manufacture and use of explosive devices, but New York's item censorship provision gave the inmate the option of receiving the magazine without this material. See Central Office media review decision, December 8, 1987, lodged by amicus with the Clerk of Court. Am. Lodg., p. 75.

Such examples can be multiplied based on common experience. Magazines about agriculture or outdoor life may contain articles about wine-making or hand-packing ammunition, which can properly be censored, but prisoners should be able to read the other contents of such magazines.

the Bureau of Prisons admitted that there would be no threat to security in permitting item censorship and acknowledged: "There really is no reason for not doing so." Carlson Dep. 72.

Item censorship need not be administratively burdensome. The New York provision is carefully crafted for manageability, providing that the inmate may

> [r]eceive the publication with the objectionable matter removed or blotted out. . . if the objectionable portions of the publication constitute eight or fewer individual pages or if they constitute a single chapter, article or section of any length. This option need not be made available if the publication is in a form other than a book, magazine, or newspaper, and if removing or blotting out portions would present physical difficulties.
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> New York Directive, supra n. 10, App. B-13.

Indeed, item censorship is likely to reduce Petitioners' administrative burden,

since inmates are less likely to seek review of censorship decisions if it is clear that prison officials censor no more than their legitimate interests require.

D. Administrative review should include a de novo examination of the disputed publication and the propriety of censoring it.

Federal prisoners, in theory, have a right of appeal of acts of censorship, first to the Bureau's Regional Directors and then to the General Counsel. 28 C.F.R. §§ 540.71(d,e), 542.10 et seq. (1987). In reality, this appeal right means little, because the reviewing officials exercise only the most deferential scrutiny, with censorship decisions subject to a "presumption of regularity."[46]

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[46] Indeed, the reviewing official formerly did not even see the censored publication; the Bureau revised its regulations during the pendency of this case. T. 1126; Cripe Dep. I, 129-32; Cripe Dep. II, 87-90.

T. 1040-46, 1410; Cripe Dep. I, 129-32.

This Court in Procunier and the lower courts in publication censorship cases have required that censorship decisions be reviewed by an official uninvolved in the original censorship decision.[47] Such review should be de novo and based on an inspection of the censored publication itself in order to determine whether "prison officials and employees appl[ied] their own personal prejudices and opinions" or "used [their discretion] to suppress unwelcome criticism." Procunier, 416 U.S. at 415. The subject to be reviewed is not merely procedural regularity but the substantive legitimacy of the censorship.

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47 Procunier, 416 U.S. at 418-19; Murphy v. Missouri Dept. of Corrections, 814 F.2d at 1258; Hopkins v. Collins, 548 F.2d at 504; Cofone v. Manson, 409 F.Supp. at 1041.

This view is consistent with the Court's decisions concerning civilian censorship schemes,[48] because censoring agencies develop "an 'expertise' tending to favor censorship over speech." City of Lakewood v. Plain Dealer Publishing Co., ___U.S.___, 100 L.Ed.2d at 785, 108 S.Ct. at 2145 (1988). As noted supra at 11, the need for independent review of the censor's acts is, if anything, greater in the prison context than elsewhere. That review must independently address the propriety of each act of censorship based on an examination of the censored material and close scrutiny of the censor's reason-

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48 Indeed, in non-prison cases, the Court has held that "only a judicial determination in an adversary proceeding ensures the necessary sensitivity to freedom of expression." Freedman v. Maryland, 380 U.S. at 58. See Jacobellis v. State of Ohio, 378 U.S. 184, 187-90 (1964) (rejecting "substantial evidence" review of obscenity determinations).

ing.

The importance of independent review is demonstrated by experience in New York. The Central Office Media Review Committee in New York reviews facility censorship decisions de novo with a copy of the publication available. Even after the Dumont reforms, substantial numbers of decisions are reversed on appeal,[49] demonstrating that the risk of erroneous deprivation of First Amendment rights by censors working in a prison remains high and that the value of detached and independent review in avoiding such deprivations is great.[50]

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49 Of 62 Central Office media review decisions recently reviewed by counsel for amicus, 18 reversed the facility decision with the statement: "This publication does not violate any of the guidelines in Directive 4572." See Central Office media review decisions, November 1987-January 1988, on file in the offices of the Prisoners' Rights Project of The Legal Aid Society of the City of New York.

50 See Matthews v. Eldridge, 424 U.S. 319, 334-35 (1976); see also Cleavinger v. Saxner, 474 U.S. at 204 (". . . the relationship between the keeper and the kept . . . hardly is conducive to a truly adjudicatory performance").

CONCLUSION

Adoption of a relaxed standard of judicial review of prison censorship would constitute "an abnegation of judicial supervision . . . inconsistent with [the Court's] duty to uphold the constitutional guarantees." Jacobellis, 378 U.S. at 187-88. Under our Constitution, it is the courts that have the expertise, and to whom deference is due, in matters of free speech. Landmark Communications, Inc. v. Virginia, 435 U.S. at 842-43; Freedman v. Maryland, 380 U.S. at 58; Emerson, The System of Freedom of Expression at 13 (1970); Monaghan, "First Amendment 'Due

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(footnote cont'd)

Process,'" 83 Harv.L.Rev. 518, 523-24 (1970).

The courts should, of course, minimize their involvement with prison censorship insofar as they can do so without jeopardizing First Amendment rights. To this end, the Court should adopt prospective safeguards for prison censorship that will minimize the overbreadth of such censorship and thereby obviate the need for most judicial review of particular censorship disputes. These safeguards should include:

- Narrow, specific and exclusive guidelines spelling out the type of material that can be censored;

- Explicit statements of how the content of the publication violates a specific censorship rule;

- Censorship only of those portions of a publication that violate specific censorship rules, within manageable limits; and

- Independent, de novo administrative review that includes substantive scrutiny of the publication as well as procedural review.

In this light, the judgment of the United States Court of Appeals for the District of Columbia Circuit should be affirmed.

New York, New York
August 22, 1988

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APPENDICES

APPENDIX A

Additional Examples of Unjustified Censorship from New York State Prisons Prior to the Dumont v. Coughlin Reforms[1]

1. Revolutionary Worker, vol. 3, no. 47 (April 2, 1982), was censored because "Articles on pages 12 and 19 call for revolution/unrest against the United States." In fact, one article concerns a 1967 peasant revolt in India, and the other, "The '60s-70s Shift," concerns the alleged errors of Chinese leadership and the resulting lessons for Marxist-Leninist thinkers. There is no advocacy of disruptive or unlawful conduct. Am. Lodg., pp. 76-95, 96.

2. The Militant, vol. 46, no. 1

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[1] These items and corresponding documentation are lodged with the Clerk of Court. Am. Lodg., pp. 76-267.

(January 1, 1982), was censored because of an article titled "Lessons of Polish Workers' Struggle." The censor cited "Guidelines 5 (. . . rebellion against governmental authority) & Guidelines 6 & 9 (Security)." The article endorses "the heroic struggles of the Polish workers and farmers" and advocates "telling the truth about what the Polish workers and farmers have been fighting for." Similar sentiments were shared by most Americans, including President Reagan.[2] Am. Lodg., pp. 97-116, 117.

3. The Militant, vol. 46, no. 2 (January 22, 1982), was censored because of an article titled "Milwaukee Cop Indicted for Murder in Killing of Black

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2 See "Reagan Tells Polish Regime Its 'Crime Will Cost Dearly'; Curbs Credit and Commerce," New York Times, December 24, 1981, at 1, 10.

Youth," based in part on "Guideline 9 (Security); Guideline 6 (Security)," without further explanation. Another inmate was denied the publication because of the "Milwaukee Cop" article and another article, "Haitian Refugees Fight Reagan Detention Camps," with a similar lack of explanation. Neither story advocates any illegal acts; both report events that were widely publicized in the press[3] and on radio and television. Am. Lodg., pp. 119-138, 139.

4. The Militant, vol. 46, no. 21

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3 See, e.g., "Accidents or Police Brutality," Time, October 26, 1981, at 70; "Milwaukee's Cops Under Fire," Newsweek, February 15, 1982, at 31; "Two Officers Arraigned in Death in Milwaukee," New York Times, February 6, 1982, at 7; "Flash Fires of Rumor Keep Haitian Camp on Edge," New York Times, January 1, 1982, at 7; "Improvements Pledged for Haitian Refugee Site," New York Times, January 7, 1982, at 14; "The Haitian Chant: Liberte," Newsweek, January 11, 1982, at 27.

(June 4, 1982), was censored because an article "presents authority figures acting in a violent way toward the population. This article could support the concept of anarchy and rebellion against governmental authority." The censor cited "Rules 5 + 6 (Security)." The article, "Brutal police attack in Puerto Rico," recounts the eviction of 200 families from a shantytown near San Juan. It advocates donations of medicine, clothing and money for the evicted persons. Am. Lodg., pp. 140-155. 156.

5. The Militant, vol. 46, no. 22 (June 11, 1982), was censored because an article "presents law enforcement officials in a manner which could lead to anarchy and therein present a threat to the safety and security of the correctional facility." The censor cited "Rules 5 + 6 (security)." The story, "Protests

hit racist L.A. cop's defense in murderous chokehold," concerns the controversy over the Los Angeles Police Chief's remark that "in some blacks when [the chokehold] is applied, the veins or the arteries do not open as fast as they do in normal people." This controversy was widely reported in the national press[4] without causing discernible anarchy in prison or elsewhere. Am. Lodg., pp. 157-176, 177.

6. The Militant, vol. 46, no. 29 (July 30, 1982), was censored because page 24 violated guideline 3, prohibiting publications that "incite violence based on race, religion, creed or nationality." Page 24 contains one article about the

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4 See, e.g., "The Chokehold Controversy," Newsweek, May 24, 1982, at 32; "Los Angeles Police End Use of Choke Hold That Stops Air," New York Times, May 8, 1982, at 20; "Urban League in Los Angeles Asks Police Chief Suspension," New York Times, May 12, 1982, at A-24.

Socialist Workers' Party's election campaign and the need for help with petitions, one article about the killing of a black youth in Bessemer, Alabama,[5] and a third article about the death of a black transit worker at the hands of a white mob in Brooklyn.[6] Am. Lodg., pp. 178-201,

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[5] The "incitement" in the Bessemer story consists of a witness's statement that

> ". . . the city should fire the officer, the [victim's] family should be well paid, and [the officer] should be charged with murder. If the grand jury doesn't turn in an indictment, people ought to demonstrate and picket these folks." Suggesting a business boycott, he said, "You can hurt them if you just keep the money in your pocket."

[6] In this story, a black minister delivers the following "incitement":

> . . . You [whites] can give this community an image to be proud of by taking a strong public stand against this racist murder and all racism and . . . by standing up tall for human rights and dignity.

The Brooklyn incident was front-page news

202.

7. The Torch, vol. 9, no. 2 (February 15-March 4, 1982), was censored because of two articles on page 6, "Racist rampage at Brushy Mountain prison" and "Killer cops go free," which were allegedly "based on racism and could incite a disturbance in a correctional facility. These articles could therefore present a risk to the safety and security of inmates housed in our correctional facilities." The censor cited guideline 9, prohibiting material that "presents a clear and immediate risk to the safety of any person or . . . to the order of the correctional facility."

The first article describes an inci-

(footnote cont'd)

in the daily press. See New York Times, June 23, 1982, at 1.

dent in which white prisoners shot several black prisoners. The second article discusses the death in a California jail of Ron Settles, a black football player, and the dismissal of complaints against two Milwaukee police officers accused of killing Ernest Lacy, a black detainee. All three of these incidents were widely reported in the national press.[7] The stories are in no sense "based on racism"; at most, they report events which arguably demonstrate that racism exists. Am. Lodg., pp. 203-224, 225.

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[7] See, e.g., "Inquiry on Jail Death of Black Athlete Widens Divisions in California Town," New York Times, November 2, 1981, at A-16; "Milwaukee Police Target of Sit-In," New York Times, February 7, 1982, at 73; "Fortress Prison Harbors Violence That Erupted in Death of 2 Blacks," New York Times, February 17, 1982, at 16; "Accidents or Police Brutality," Time, October 26, 1981, at 70; "Milwaukee's Cops Under Fire," Newsweek, February 18, 1982, at 31.

8. Workers World, vol. 24, no. 3 (January 16, 1982), was censored because of an article on page 2 titled "Lesbian, Gay Focus of PAM [People's Anti-War Mobilization] Slams Racism"; the censor cited several of the media review guidelines, but the only explanatory material is the phrase ". . . rebellion against governmental authority . . ." and the word "Security." The article in question reports the passage of a resolution condemning

> All forms of racism, sexism and discrimination against lesbians and gay men, the elderly and the disabled. . . . The Lesbian and Gay Focus of PAM fully supports all activities aimed at ending racist policies, and calls upon all community individuals and organizations to support that struggle.

There is no advocacy of disruptive or unlawful conduct. Am. Lodg., pp. 226-241, 242.

9. The Torch, vol. 9, no. 5 (May 15-June 14, 1982), was censored because an article on page 2 "could lead to emotional reaction which could present a risk to the safety and order of a correctional facility," based on guideline 9, quoted above. The article consists of a column from a Connecticut newspaper written by a federal prisoner concerning a federal court injunction barring his transfer to Wisconsin.

The article contains no advocacy of unlawful, violent or disruptive activity, and the facts of Mr. Simmat's case are available to every prisoner who has access to a law library in Simmat v. Manson, 535 F.Supp. 1115 (D.Conn. 1982). Am. Lodg., pp. 243-266, 267.

APPENDIX B

STATE OF NEW YORK

DEPARTMENT OF CORRECTIONAL SERVICES

DIRECTIVE 4572

Subject: Media Review

(4/24/86)

I. POLICY

It is Departmental policy to encourage inmates to read publications from varied sources if such material does not encourage them to engage in behavior that might be disruptive to orderly facility operations. Accordingly, inmates shall be allowed to subscribe to and possess a wide range of printed matter such as books, magazines and newspapers, subject to the provisions of this directive, because these items may promote constructive individual development.

In the event that the Superintendent, or his designee, believes that printed material addressed to an inmate represents a possible threat to orderly facility operations, that material will be referred to the Facility Media Review Committee (FMRC) for its assessment and disposition.

Exception: At Auburn Correctional Facility and Clinton Correctional Facility the provisions of the Dumont stipulation take precedence whenever they differ from the provisions of this directive.

II. STANDARDS

The Department adopts the following guidelines by which literature for inmates will be evaluated.

A. In general, the materials should be acceptable for regular mailing according to United States postal law and regulations.

B. Publications which contain child pornography or which promote a sexual performance of a child in violation of Penal Law Article 263 are unacceptable. Publications which, taken as a whole, by the average person applying contemporary community standards, appeal to prurient interest, and which depict or describe in a patently offensive way sexual bestiality, sadism, masochism, or necrophilia, and which taken as a whole, lack serious literary, artistic, political or scientific value are obscene and are unacceptable.

C. The publication should not incite violence based on race, religion, sex, sexual orientation, creed, or nationality. "Incite violence," for purposes of this guideline, means to advocate, expressly or by clear implication, acts of violence.

D. Any publication which advocates and presents a clear and immediate risk of lawlessness, violence, anarchy or rebellion against governmental authority is unacceptable.

E. The publication should not incite disobedience towards law enforcement officers or prison personnel. "Incite disobedience," for purposes of this guideline, means to advocate, expressly or by clear implication, acts of disobedience.

F. The publication should not give instruction in the use or manufacture of firearms, explosives, and other weapons, or depict or describe their manufacture. Mere depictions of the use of hunting and/or military weapons which reasonably would not affect the safety and/or

security of the facility are not prohibited.

G. The publication should not provide instruction by word(s) or picture(s) regarding martial arts skills. Martial arts includes, but is not limited to, aikido, jiujitsu, judo, karate, kung fu, and tai chi chu'an. Publications which discuss martial arts without providing instruction are acceptable.

H. The publication should not:

1. Contain information which appears to be written in code; or

2. Depict or describe methods of lock picking; or

3. Depict or describe methods of escape from correctional facilities; or

4. Depict or describe procedures for the brewing of alcoholic beverages or the

manufacture of drugs or use of illegal drugs; or

5. Depict or describe methods or procedure of smuggling prison contraband; or

6. Depict or describe techniques or methods for rioting and/or information instructive in hostage or riot negotiation techniques.

The Department reserves the right to deny the inmate publications which may be held non-inciteful or non-advocative, as the case may be, during the Media Review Process, but which actually result in violence or disobedience after entrance into a facility, as is clearly set forth in guidelines 3 and 6 above. Such items shall be referred to the Facility media Review Committee, and if appealed, referred to the Central Office Media Review Committee, for decision.

Publications which discuss different political philosophies and those dealing with criticism of Governmental and Departmental authority are acceptable as reading material provided they do not violate the above guidelines. For Example, publications such as Fortune News, The Militant, The Torch/La Antorcha, Workers World and Revolutionary Worker shall generally be approved unless matter in a specific issue is found to violate the above guidelines.

The purpose of the foregoing guidelines are to facilitate access by inmates to a wide range of literature.

Superintendents and staff of correctional facilities are urged to use whatever means they have available to provide facility libraries with literature which presents

differing points of view relevant to the issues of the day.

III PROCEDURE

In view of the above considerations, the Department specifies the following procedures for the evaluation and approval or disapproval of literature for inmates.

A. Establishment of Facility Media Review Committed (FMRC)

Each institution will establish a media review committee. It is suggested that this committee consist of representatives from Program Services (for example, representatives from the Service Unit, Mental Hygiene staff, Chaplains' Office, Education staff, and Library staff) and representatives from Security staff.

The superintendent will inform the Commissioner of the membership of the facil-

ity Media Review Committee. The superintendent will also inform the Commissioner of any changes in said membership.

B. Referral of Publications to FMRC, Notice to Inmate

Publications properly received at the facility for an inmate in mail or packages shall be delivered to the inmate in the ordinary course of mail or package delivery unless referred to the FMRC upon a reasonable good faith belief that the publication violates one or more of the media review guidelines listed in Section II above of this directive.

When there is a good faith belief that a publication already belonging to or in possession of an inmate violates one or more of the media review guidelines, said publication shall be confiscated and

referred to the FMRC for review and decision.

Publications referred to the FMRC shall be delivered promptly to FMRC. Notice to the inmate (Exhibit A) advising of such referral must be placed in the institutional mail at the same time as the publication is referred.

C. Facility Media Review Committee Operations

1. The FMRC shall meet a least once weekly unless there are no publications for review.

2. A decision regarding a publication shall be rendered by the FMRC within ten working days of the publication's receipt at the facility.

3. Should the FMRC approve a publication, said publication shall be forwarded promptly to the inmate.

4. Should the FMRC disapprove a publication, such decision shall be in the form provided in Exhibit B, and include a brief statement of reasons explaining why the publication is deemed to violate one or more of the media review guidelines and identifying by page number, article title, and location on the page, the contents objected to. (The FMRC shall not state that a publication is unacceptable in its entirety). An example concerning such brief statement of reasons is set forth below:

The following is an acceptable statement of reasons:

"This publication incites inmates to commit assaults on correctional officers in the Article 'Prison Rebellion Now' on page 10, near the bottom."

The following is not an acceptable statement of reasons:

"This publication incites disobedience towards law enforcement personnel on page 10."

5. Notice to Inmate. When the FMRC disapproves a publication, a copy of Exhibit B (see C-4 above) shall be sent promptly to the inmate.

D. Inmate Options Regarding Appeal or Other Disposition When Notified That a Publication Has Been Disapproved by Facility Media Review Committee

When the FMRC disapproves a publication, the inmate shall be permitted to select one of the following methods of disposition: (see Exhibit B)

1. Appeal to the Central Office Media Review Committee (COMRC). The

inmate shall not be entitled to appeal unless he chooses this option within 30 days of the FMRC decision.

2. Receive the publication with the objectionable matter removed or blotted out. This option shall be available only if the objectionable portions of the publication constitute eight or fewer individual pages or if they constitute a single chapter, article or section of any length. This option need not be made available if the publication is in a form other than a book, magazine, or newspaper, and if removing or blotting out portions would present physical difficulties.

3. Have the publication sent, at the inmate's expense, to a person of the inmate's choice, not another inmate or a Department of Correctional Services official, either immediately or after 30 days.

4. Have the publication destroyed

after 30 days. If the inmate does not make a choice among these options within 30 days of the FMRC decision, the facility may dispose of the publication in any manner.

E. Appeals to Central Office Media Review Committee

When an inmate elects to appeal the FMRC's disapproval of a publication, he shall check the appropriate box on the disposition notice (Exhibit B). He may also, at his option, submit an appeal letter. The FMRC shall forward the appeal notice and letter, if any, with the publication in question to the COMRC. Appeals shall be forwarded at facility expense by first class mail or equally prompt means.

F. Establishment of Central Office Media Committee (COMRC)

The Central Office Media Review Committee (COMRC) will consist of representatives of Program Services, Security Services, and Administrative Services. The Committee will be chaired by the Deputy Commissioner for Program Services of his designee.

G. Central Office Media Review Committee (COMRC) Operations

1. The COMRC shall meet at least once weekly unless there are no publications awaiting review.

2. All publications appealed to the COMRC will be reviewed and a decision rendered thereon within 3 weeks of the date the appeal was received by the COMRC.

3. The COMRC in deciding whether to approve or disapprove a publication shall consider any statements submitted in a timely manner.

4. The COMRC decision shall be in

the form provided in Exhibit C. The COMRC will notify the Superintendent and he, in turn, will notify the inmate of the decision.

5. When the COMRC disapproves a publication, the inmate shall have the following options:

a. Receive the publication within the objectionable portions blotted or cut out. This option is available only if the objectionable portion is eight pages or less, or a single chapter, article, or section of any length.

b. Have the publication sent, at the inmate's expense, to a person of the inmate's choice, not another inmate or a Department of Correctional Services official, either immediately or after 30 days.

c. Have the publication destroyed.

d. Have the publication retained at the facility for 30 days while the inmate makes arrangements for its disposition, including being picked up by a visitor during the period.

If a choice is not made within 30 days, disposal of the material will be at the discretion of the Superintendent.

H. List of Approved Publications Approved by the Central Office Media Review Committee.

On a weekly basis, the COMRC shall prepare a list of all the publications it has approved in the past week, and shall mail a copy of that list to the chairman of each FMRC.

I. Action by the Facility Media Review Committee on Held Items Approved by the Central Office Media Review Committee

The chairman of each FMRC shall determine whether the names of any publications previously disapproved by the FMRC appears on the list, and whether said publication is being held pursuant to inmate choice. Should any such publication be in the possession of the FMRC, it shall immediately be forwarded to the inmate.

J. SUBSCRIPTIONS

Inmates will not be prohibited from subscribing to newspapers, magazines, and periodicals, but shall be informed that individual issues may be withheld if material contained therein is confirmed to be in violation of the guidelines set forth in this Directive. If, after being advised of these conditions, inmates wish to subscribe to newspapers, magazines, and periodicals, they will be allowed to do so.

K. SOURCE OF PUBLICATIONS*

Books, magazines and periodicals received from other than the publisher may be delayed through the Package Room up to six days while being subject to Media Review guidelines. All material is subject to Media Review guidelines.

Newspapers may only be received from the publisher or an approved distributor, subject to Media Review guidelines.

L. RE-REVIEW

A re-review of a publication which has been disapproved by a FMRC will be conducted by the FMRC upon the request of an inmate no less than eighteen months subsequent to the previous disapproval.

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* The text of sub-paragraph III-K was added by amendment of 1/6/87.

Nothing contained herein shall prevent review of such publications by the FMRC or COMRC prior to eighteen months after disapproval, where conditions warrant.

EXHIBIT "A"

REFERRAL NOTICE

_____ CORRECTIONAL FACILITY

Date:_____

Inmate Name:_____

Identification No.:_____

Cell Location:_____

The following publication

_____
(Title)

_____
(Author, Date or Volume and Number)

has arrived at the facility addressed to you and has been held for review by the Facility Media Review Committee. You are invited to submit a written statement in support of the admission of the publication. Address your comments to:_____

_____, Chairperson of the Facility Media Review Committee, promptly,

since the committee must reach a decision usually within ten working days of the date of this notice.

EXHIBIT "B"

DISPOSITION NOTICE

_____ CORRECTIONAL FACILITY

MEDIA REVIEW COMMITTEE

DATE:_____

_____

INMATE NAME NUMBER CELL LOCATION

The publication_____
(Title)

_____
(Author, Date or Volume & Number)

has been reviewed by the Facility Media Review Committee and the following portions:

_____
(Pages, Articles, or Location of Offensive Portions)

have been found unacceptable for the following reasons:

_____

_____

_____

(Guideline Number and Reason)

You now have the following options (please check one):

( ) Appeal to the Central Office Media Review Committee by checking this box and sending this form and (if you desire) a letter in support of your appeal to the Facility Media Review Committee (FMRC).

( ) Receive the publication with the objectionable portions blotted or cut out. This option is available only if the objectionable portion is eight pages or less, or is a single chapter, article, or section of any length.

( ) Have the publication sent to a person of your choice, not another inmate or a Department of Correctional Services official, at your expense after 30 bays. If the FMRC receives notice that this publication has been approved before it is sent out, you will receive it.

( ) Have the publication sent to a person of your choice, not another inmate or a Department of Correctional Services official, at your expense immediately.

Send to:_____

_____

( ) Have the publication destroyed after 30 days. If the FMRC receives notice that the publication has been approved before it is destroyed, you will receive it.

If you do not make a choice within 30 days, disposal of your material will be at the discretion of the Superintendent or his designee.

_____ _____

INMATE SIGNATURE DATE

EXHIBIT "C"

DEPARTMENT OF CORRECTIONAL SERVICES

CENTRAL OFFICE MEDIA REVIEW COMMITTEE

Building 2, State Campus

Albany, New York 12226

Date:_____

_____

INMATE NAME NUMBER FACILITY

The decision of the _____

Facility Media Review Committee denying you the right to receive the publication

_____

(Title)(Author, Date, or Volume and Number)

has been affirmed ( ) reversed ( ) by the Central Office Media Review Committee for the following reasons:

_____

_____

If the decision was reversed, you should receive the publication with this

form. If the decision was upheld, you now have the following options:

( ) 1. Receive the publication with the objectionable portions blotted or cut out. This option is available only if the objectionable portion is eight pages or less, or is a single chapter, article, or section of any length.

( ) 2. Have the publication sent to a person of your choice, not to another inmate or a Department of Correctional Services Official,, at your expense. Send to:

Name:_____

Address:_____

_____

( ) 3. Have the publication destroyed.

( ) 4. Have the publication retained at the facility for 30 days while you make arrangements for its disposition.

If you do not make this choice within

30 days, disposal of the material will be at the discretion of the Superintendent or his designee.

Send this form to your Facility Medical Review Committee, since all censored publications are returned to this committee.

APPENDIX C

INDEX TO MATERIALS LODGED WITH THE CLERK OF COURT BY AMICUS CURIAE CORRECTIONAL ASSOCIATION OF NEW YORK

Consolidated Lodging

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* The corresponding publication, a bound book, is lodged separately.

Lodged Separately

Hinds, Illusions of Justice: Human Rights Violations in the United States (University of Iowa 1978)

Blackstock, Cointelpro: The FBI's Secret War on Political Freedom (Random House 1976)

The Iron Fist and the Velvet Glove: An Analysis of the U.S. Police (Center on Research on Criminal Justice 1975)